HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2) (b)

Description of the case.

A.O. No. 1519 of 2001
Tehri Hydro Development Corporation Ltd.

Vs.

Karam Chand Thapar and Bros. (Coal Sales)
Ltd. Tehri, District Tehri Garhwal and another

Approved for reporting.

~~Not approved for reporting~~

Date of decision 23.12.2004

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

A.O. No. 1519 of 2001
Old No. 1063 of 1995

Tehri Hydro Development Corporation Ltd. .....Appellant

Versus

1. Karam Chand Thapar and Bros. (Coal Sales) Ltd; Tehri, District Tehri Garhwal and another
2. State of U.P. .....Respondents.

Sri U.K. Uniyal Sr. Advocate assisted by Sri Sobhit Saharia, Advocate.
Sri V.K. Kohli, Sr. Advocate assisted by Sri I.P. Kholi, Advocate.

Dated: December 23,2004

Hon'ble Rajesh Tandon, J.

Heard the learned counsel for the partiers.

Present appeal has been filed against the judgment and order dated 4.8.1995 passed by the District Judge, Tehri Garhwal, thereby rejecting the petition of the appellant under section 30 and 33 of the Arbitration Act for setting aside the award.

Briefly stated, as agreement was entered between the appellant and respondent no.1 on 28.4.1978 for manufacturing Chain Link Fabric of approximate 50mm mesh woven form 9 SWG steel wires. The respondent no.1 did not use 9 SWG steel wires and used 10 SE Steel wires, which is inferior in quality for

manufacturing the chain link fabric. The appellant accordingly reduced the amount to Rs.55/- PER Sq.M. whereas the respondent no. 1 claimed a rate of Rs. 71/- per Sq. M., which was refused by the appellant. This raised a dispute, which was referred to arbitration.

The arbitrators gave an award on 5.31994 allowing the claim of respondent no.1 and fixed the rate of Rs.65/- per sq. m. The arbitrators accordingly held that Rs.1,92,347.28 was payable to the claimant respondent no.1. They further allowed payment of interest @ 12% per annum of the aforesaid amount from 23.11.1987 to 5.3.1994 and further interest @ 6% on the principal amount from the date of award to the date of decree.

Respondent no.1 has filed objections in proceedings under section 30 and 33 of the Arbitration Act, 1940. The appellant has submitted that as per directions of the contract chain link fabric was to be made out 9 SWG wire as per directions of the Engineer-in charge. The contractor made fabric out of 10 SWG wire, which is lighter and cheaper requiring less material and labour and deduction at the rate of Rs.5/- per Sq. m. was rightfully made which was conveyed to the contractor vide letter dated 12.9.1987. The appellant has further submitted that the rate of Rs.55/- per sq.m. payable against this item of work had been earlier conveyed to the contractor. Contractor received various payments. The contractor received payment without any protest. It is also submitted that the award suffers from factual and legal infirmities.

Respondent Karam Chand Thapar and Brothers filed objections traversing objections of the appellant. It has been submitted that the objections are time barred and the award cannot be challenged on the alleged grounds. It is also

submitted that incorrect facts have been mentioned from the said of objections.

On the pleadings of the parties, the reference Court has framed the following issues:

1. Whether arbitrators misconducted themselves in making the award?
2. Relief, if any?

The District Judge, Tehri Garhwal has recorded a finding that Tehri Hydro Development Corporation was agreeable to the rate of Rs.60/- at the time of the award. The contractor was claiming Rs. 70/- and the arbitrator in the peculiar facts truck the golden mean of Rs. 65/-. The District Judge has held that the arbitrators did not misconduct themselves in rendering the award and rejected the objections, under section 30 and 33 of the Arbitration Act, vide impugned order dated 4.8.1995. I do not find any illegality or infirmity in the award passed by the arbitrators and confirmed by the District Judge, Tehri Garhwal.

However, Mr. U.K. Uniyal, Sr. Advocate for the appellant, has submitted that the arbitrators had awarded interest pendent lite notwithstanding the prohibition contained in the contract against the payment of interest on delayed payments. Clause 1.2.14 of the contact was relied upon in this behalf and that clause reads as under:

1.2.14 *NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC.*

The contractor agrees that no claim for interest or damages will be entertained or payable by the Government in respect of any money or balances which may be lying with the Government owing to any disputes, difference or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer-in-charge in

making intermediate or final payments or in any other respect whatsoever.

The learned counsel for the appellant has urged that this clause contained an absolute prohibition against the payment of interest on account of any delay on the part of the appellant in making interim or final payment or otherwise.

In support of his contention, the learned counsel for the appellant has relied upon (2003) 5 SCC 705 Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. In this case the apex Court has dealt with the grounds on which a court can, under Section 34 (2) of he Arbitration and Conciliation Act, 1996 can set aside the arbitral award. The Facts of this case are not applicable to the present case.

The learned counsel has also cited (2001) 2 SCC 721, Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj & others. In that case the apex Court as per majority has held that arbitrator, whether appointed with or without intervention of Court, has power to grant interest in respect of per reference period, provided there is no stipulation or prohibition in the arbitration agreement excluding his jurisdiction. The Forum of arbitration created by consent of parties, with or without intervention of Court, being only a substitute for conventional civil court, it is an unavoidable necessity that parties be deemed to have agreed by implication that arbitrator would have the power to award interest in the same way and same manner as a court. In the present case the arbitrators have awarded no interest for pre-reference period and this citation is also not applicable to the facts of the present case.

The learned counsel for the appellant has further placed reliance on the case law (2002) 5 SCC 679 W.B. State Warehousing Corp. vs. Sushil Kumar Kayan and others. In this case the apex Court has held that arbitrator's jurisdiction to be determined by taking into consideration whether a particular claim can be raised before an arbitrator. An arbitrator exceeds jurisdiction if he decides an issue, which cannot be raised before him by virtue of contract or law. However, the facts of this case are not similar to the facts of the instant case. The learned counsel for the appellant has further relied upon (2002) 5 SCC 685, Indian National Congress (I) vs. Institute of Social Welfare and others. In this case also awarding of interest has been challenged the apex Court has held that considering the dispute involved and overall circumstances of the case, the award qua the rate of interest modified from 15% to 6%.

The learned counsel for the respondent has placed reliance on (1996) 1 SCC 516 Board of Trustees for the Port of Calcutta vs. Engineer-De-Space-Age. In this case the apex court has held that any clause in the agreement does not prohibit the arbitrator from awarding interest pendente lite. Moreover, arbitrator has jurisdiction to interpret the clause of the contract to decide whether interest pendente lite could be awarded by him thereunder. The apex Court has as under:

> *"(ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has not power to award interest pendent lite, the party claiming it would have to approach the court for that*

purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator This would lead to multiplicity of proceedings.

4. *We are not dealing with a case in regard to award of interest for the period prior to the reference. We are dealing with a case in regard to award of interest by the arbitrator post reference. The short question, therefore, is whether in view of sub-clause (g) of clause 13 of the contract extracted earlier the arbitrator was prohibited form granting interest under the contract. Now the term in sub-clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words "no claim for interest will be entertained by the Commissioner" clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may gives to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the term of the contract merely prohibits the Commissioner form paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the*

arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the arbitrator was in no manner prohibited form awarding interest pendente lite.

5. *Looked at from another point, if there was a dispute as to whether under this terms of the contract the arbitrator was prohibited form awarding interest pendente lite, that was a matter which fell within the jurisdiction of the arbitrator, as the arbitrator would have to interpret sub-clause (g) of clause 13 of the contract and decide whether that clause prohibits him from awarding interest pendente lite. In that case it cannot be said that the arbitrator had wandered outside the contract to deny to him jurisdiction to decide the question regarding payment of interest pendente lite. Even if we were to accept the contention urged by the learned counsel for the appellant placing reliance on paragraphs 26 and 29 of the Associated Engineering Co. case[2] we think, that the arbitrator was well within his jurisdiction in awarding interest pendente lite.*

In present case the arbitrators have awarded a sum of Rs. 1,92,347.28 with interest @ 12% per annum form 23.11.1987 to 5.3.1994 and further interest @ 6% on the principal sum of Rs. 1,92, 347.28 from the date of the award i.e. 5.3.1994 to the date of the decree. The District Judge, Tehri Garhwal has also held that the arbitrators did not misconduct themselves in rendering the award.

Section 7-A, U.P. Amendment in the Arbitration Act, 1940 reads as under:

“7-A. Whether and in so far as an award is for the payment of money, the arbitrators or umpire may deem reasonable to be paid on the principal sum awarded, from the date of the commencement of the arbitration, as defined in sub section (3) of Section 37, to the date of award, in addition to any interest awarded on such principal sum for nay period prior to such commencement, with further interest at such rate not exceeding six per cent per annum as the arbitrators or umpire may deem reasonable on such principal sum from the date of the award to the date of payment or to such earlier date as the arbitrators or umpire may think fit, in no case beyond the date of the decree to be passed on the award.”

Thus Section 7-A of the Arbitration Act, clears the position regarding award of interest by the arbitrator for the period of pendency of the reference as well as since the date of the award. However, the rate of interest from the date of the award to the date of payment shall not exceed six percent.

Lastly learned counsel for the petitioner has submitted that the rate of interest awarded by the arbitrators is too high and actually it ought to have been 6% throughout. I am not convinced with the argument of the learned counsel for the petitioner. No interference can be made by the appellate Court in the rate of interest awarded by the arbitrator in view of the proposition law laid down by the apex Court in (1999) 7 SCC 399 State of J & K vs Dev Dutt Pandit. The apex Court has observed as under:

“21. *In the present case the arbitrator awarded interest at the rate of 10% per annum which was reduced by the learned Single Judge to 6% per annum and upheld by the Division*

Bench. Under Section 34 of the Code of Civil Procedure interest at a higher rate than 6% can be awarded where the liability in relation to the sum so adjudged had arisen out of a commercial *transaction. There is nothing on the record to show that interest awarded by the arbitrator at the rate of 10% is in contravention of Section 34 of the Code of civil Procedure. That being so we do not think either the learned Single Judge or the Division Bench were correct in reducing the rate of interest as granted by the arbitrator. We would, therefore, restore the award of interest at the rate of 10% per annum as granted by the arbitrator from the date the arbitrator entered into reference till realisation of the amount under the award."*

In view of the law laid down by the apex court in M/s Sudarsan Trading Co. Vs. The Govt. of Kerala and another AIR 1989 SC 890, the award made by the Arbitrator cannot be interfered. The observations are quoted below:-

"It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. See the observations of this Court in Hindustan Steel Works Construction Ltd. Vs. C. Rajasekhar Rao (1987) 4SCC 93. In the instant case the arbitrator has merely sent out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In absence of any reason for making the award, it is not open to the court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator cannot be challenged. Appraisement of evidence by the arbitrator is

never a matter, which court question and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator. See the observations of this Court in Municipal Cropn. Of Delhi VS. Jagan Nath Ashok Kumar (1987) SCC 497;(AIR 1987 SC 23(6)."

In view of the law laid down above, no interference can be made in the rate of interest awarded by the arbitrators and confirmed by the District Judge.

Consequently, the appeal is dismissed. No order as to costs.

(Rajesh Tandon, J.)

December 23, 2004
*Dhyani